

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE ABBEY,

Defendant-Appellant.

UNPUBLISHED
September 23, 2010

No. 292987
Kent Circuit Court
LC No. 07-007922-FH

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of failure to pay child support, MCL 750.165, and, alternatively, the resultant restitution order in the amount of \$48,248.42, which the trial court imposed along with a term of five years' probation and nominal costs. We affirm the conviction, but remand for further proceedings on the issue of restitution. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

This case began in 1993 with a paternity action involving two children and a resultant court order requiring defendant to pay the children's mother child support. At trial, defendant admitted his paternity and that his support obligations dated back to 1993, but stated that he did not learn of those obligations until several years later because he was incarcerated. Defendant testified that in April 2005, the children's mother forgave \$42,000 in arrearages in exchange for \$7,000.

The case worker for the friend of court reported several missed payments between 2004 and 2007, but confirmed that the children's mother had forgiven a large arrearage from earlier.

Defense counsel urged the jury to find defendant not guilty on the ground that defendant did not know exactly how much he owed, stating, "if anybody can figure out a true, valid figure, I'd like to hear it. Because they don't have it." But the jury was not persuaded by this argument and found defendant guilty of failure to pay child support.

II. ABILITY TO PAY

Before trial, the prosecution filed a motion in limine to bar the defense from “offering or introducing in the jury’s presence, any evidence, reference to evidence, testimony, remarks, questions, or arguments . . . pertaining to Defendant’s ability or inability to pay court-ordered child support” Over defendant’s objection, the trial court granted the motion, citing *People v Adams*, 262 Mich App 89, 98-100; 683 NW2d 729 (2004).

At trial, some of the testimony referenced defendant’s ability to pay, prompting the trial court to provide a special instruction to the jury:

Ladies and gentlemen, . . . we had . . . some questioning about amounts that were owed and I want to explain to you just a little bit more why, and go into a little bit more detail so that you understand the premise behind it.

The defendant is charged with . . . failing to pay support as ordered in a particular court order . . . , and some of the questions that defense counsel was getting into yesterday had to do with how much is owed, and there were differences of opinion maybe about the total amount that was owed.

Basically, I allowed that questioning to be done, because if there’s an issue about whether there was no support owed, that would obviously be a defense to the claim. If a person has paid all support and didn’t owe the payments because they had been paid or pre-paid or overpaid, whatever the case may be, then that would be a legitimate area to get into and it would be a defense to the charges, arguably.

On the other hand, . . . the charge is failing to pay support, not failing to pay X number of dollars of support. So if somebody, in the case the defendant, was ordered to make payments in support, and owed that support and . . . didn’t make the payments, it doesn’t matter whether he owed 50,000, 25,000, 10,000 5,000, or 1,000. So to the extent the questions get into how much is owed, and if the witness, for example, thinks that according to his records 40,000 were owed but the defendant thinks only 20,000 were owed, it doesn’t matter, as long as some is owed and not paid.

But, if the witness feels that 10,000 is owed and the defense has evidence to suggest that no money was owed, then that would be legitimate. So I hope you understand what I’m saying here. And I basically let the questioning in yesterday because I don’t know whether they are saying that there’s no money owed, it’s been fully paid—and I analogize this a little bit like a mortgage. Most of us have mortgages, or many of us do. You may owe a \$100,000 mortgage to the bank and you’re supposed to pay \$750 a month to the bank. You might have an argument with the bank whether the balance of that mortgage is 100,000 or 80,000, but if there’s some amount of money you owe to the bank, you still have to make those payments each and every month, the \$750, until you’re paid off in full.

Now, if you are making the payments and you think you've paid it in full but the bank says you owe more, then that's the dispute, and that's the type of thing we're looking at here. But even if the person who is buying the house is right, even if he only owes 80 rather than a hundred, as long as he owes something, he's still got to make those monthly payments. So that's an analogy that I have made to you.

So with that in mind, I think to the extent there's an issue about whether there's amounts owing in child support at the time the payments were due, then I would overrule the objection. But whether it is just an objection about the amount itself, and not whether . . . there were any payments due, I would sustain it.

Defendant argues that the trial court's limitation on introduction of evidence of his ability to pay, and the above instruction limiting the jury's consideration of such evidence, prevented him from presenting a defense. We disagree.

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). Jury instructions that involve questions of law are reviewed de novo, but a trial court's determination whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). We review jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Instructions must cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support. *Id.*

A criminal defendant has a constitutional right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984), citing US Const, Ams VI, XIV, and Const 1963, art 1, §§ 13, 17, 20. But that right extends only to relevant and admissible evidence. *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984).

The case that the trial court cited when granting the prosecution's motion in limine concerning introduction of evidence of defendant's inability to pay child support is directly applicable here. In *Adams*, 262 Mich App at 100, this Court decreed that the statute in question, MCL 750.165, "provides for strict liability," and that, accordingly, the trial court in that case "erred in denying the prosecution's motion in limine to exclude evidence of defendant's inability to pay." The trial court in this case avoided that error by taking guidance from *Adams*. See also *People v Likine*, ___ Mich App ___; ___ NW2d ___ (Docket No. 290218, issued April 20, 2010, approved for publication June 8, 2010), slip op pp 2, 5 (stating that the "inability to pay is not a defense to this strict liability offense" and holding that the "[d]efendant's challenge to the ability to pay the ordered child support, as well as any of [the defendant's] bona fide efforts to pay such support, must be considered and adjudicated by the court that issued the support order"). Defendant does not address *Adams* in his brief on appeal.

Considering this Court's holding in *Adams*, and, more recently, in *Likine*, the trial court committed no error in granting the prosecution's motion in limine, nor did it improperly instruct the jury.

III. RESTITUTION

In framing his issue regarding restitution on appeal, defendant attacks the trial court's decision to include a certain amount of restitution within the judgment of sentence without resolving his objections in an evidentiary hearing. But in arguing this issue, defendant does not in fact challenge the trial court's actions. After setting forth pertinent rules of law, defendant's entire argument regarding restitution consists of the following:

At sentencing, the trial court ordered defendant to pay Forty Eight Thousand Two Hundred Forty Eight and 92/100 Dollars (\$48,248.92) in past due child support over the objections of defendant as to the amount owed. The Court told defendant to request a restitution hearing within ninety (90) days if he objected to the amount ordered by the Court.

Defendant-Appellant respectfully requests a remand to the trial court for an evidentiary hearing to determine the correct amount of the arrearage in child support.

The trial court entered a judgment of sentence on May 5, 2009, and an amended judgment of sentence on June 16, 2009, both ordering defendant to pay \$48,248.42 in restitution. On June 19, 2009, defendant filed a motion for correction of the amount of restitution. This claim of appeal followed on July 9, 2009. On August 12, 2009, the prosecution filed a written response to defendant's motion, and on August 14, 2009, the trial court held a hearing on the motion, where it apparently decided to hold an evidentiary hearing on the matter. Notice of a November 18, 2009, restitution hearing is the last document in the lower court file and the last item listed in the register of actions. It is thus impossible to ascertain from the record whether the evidentiary hearing took place, and if so, with what result.

We note that because defendant filed his motion to correct the amount of restitution before filing his timely claim of appeal, the trial court had jurisdiction to entertain the motion. See MCR 6.429(A), (B)(1). But once the lower court record was filed in the Court of Appeals, which occurred on September 21, 2009, the trial court no longer had jurisdiction to correct any part of the record without leave of this Court. See MCR 7.208(C). Accordingly, we remand for the trial court to hold an evidentiary hearing on the proper amount of restitution, and to correct the amount of restitution ordered if the court deems it necessary in light of the evidence. If the court has already held an evidentiary hearing, it need not hold another.

We affirm defendant's conviction, but remand for further proceedings on the restitution issue. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering